IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66

MARCEL MAX-LUTWAK, MUNIO KNOLL, AND REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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marriage. In particular, these materials indicate the growing realization that complete confidence and trust are essential not only to a sound marriage, but also to proper personality development.

A.

Munio Knoll Did Not Waive Objection to the Competency of Maria as a Witness. In Any Event, Under the Common Law the Incompetency of a Spouse Cannot Be Waived, and Proper Objection Was Made by a Co-defendant.

The government persists in the view that counsel for Munio Knoll made no objection to Maria's being called as a witness against him (Resp. Bf., p. 49).[7] In light of the fact, however, that the government contends that the bigamous marriage instruction, Instruction No. 22 (R. 329), was properly given on the facts of this case (Resp. Bf., pp. 75-76), the government must take the position that the jury was asked to pass upon the validity or invalidity of the rabbinical divorce obtained by Munio and Maria in Budapest in 1942. As petitioners pointed out in their Brief in Answer to Brief for the United States in Opposition to the Petition for Writ of Certiorari, at pages 9-11, the government has blown hot and cold on this issue from the very beginning.

In any event, it was not necessary for Munio Knoll to make any kind of election at the time Maria was called to the stand. If this were not true, any defendant in a bigamy trial would immediately subject himself to charges of inconsistency if he interposed objection to the testimony of his alleged first wife. For this reason it is the accepted

7. Since the government has raised the issue of Munio's claimed failure to object to Maria as a witness, it is necessary for this Court to determine whether the rule as to adverse testimony of a spouse is one of *incompetency* or one of *privilege. For if it is the former, there can be no waiver.* The common law rule, which this Court is to interpret in the light of reason and experience has always been one of incompetency.

rule that in such a trial the first wife cannot testify. In a bigamy trial the position of the prosecution obviously is, of course, that only the first marriage is a valid marriage. Here, in like manner, the position of the government was that Munio was still married to Maria; otherwise, as has been pointed out (Pet. Bf., p. 15), Instruction 22 (R. 329) had no purpose whatsoever.

The government's off-again, on-again handling of this obviously significant issue serves to highlight the claim that Munio expressly waived his *privilege* to object to Maria's testimony against him (Resp. Bf., p. 49). To be sure, at one point Munio Knoll's counsel stated that he did not wish to take advantage of the objection to Maria's competency (R. 52). The following morning, however, before Maria testified, counsel endeavored to indicate to the court the quandary in which his client was placed, an effort which the trial court cut off with a "Oh, objection overruled." Counsel promptly noted an "Exception" (R. 56-57). The circumstances of this exchange, put in the full context of the government's ambivalent attitude toward the "bigamous marriage theory" as it related to Munio and Maria, hardly justify the assertion that Munio expressly waived his *privilege*. On the contrary, since the government in this Court apparently wishes to take full advantage of what facts there are as to the questionable validity of the rabbinical divorce, the record ought not be read as showing a waiver.

In the absence of waiver, of course, Maria was competent to testify against Munio only if wives generally are competent to testify against husbands in criminal cases, for, since Maria's marriage to Munio was not controverted, the Court of Appeals' alternative position (R. 413) is inapplicable. This means, necessarily, that the broad question of competence is posed for decision and that the Court of Appeals' sweeping conclusion that the common law rule should be abolished in the light of reason and experience must be reviewed in deciding this case.

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PRELIMINARY STATEMENT.

The Government's Brief, which we here seek to answer, is a masterpiece of avoidance of petitioners' arguments. By implication it confesses the validity of those arguments. The government has failed to respond to virtually every point raised by petitioners. Among other things, it has not answered our argument based on the decision of this Court in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), it has refused to discuss, except in the briefest fashion, the

very important question bearing on the competency of spouses to testify, it has conceded the authority of *Miles* v. *United States*, 103 U. S. 340 (1881), yet lightly dismisses it as a forgotten decision, and it has not replied to our attack upon the non-existent presumption by which the court below and the trial court determined one of the most important issues in the case—the validity of the marriages under attack.

Instead, the government attempts to introduce new grounds sustaining the admission of evidence quite different from those asserted in the trial court. In addition, it has shifted away from the entire theory upon which the case was tried and then argued in the Court of Appeals. Because of the unresponsiveness of the government's Brief and the advancement of new arguments and theories, petitioners have been faced with entirely new problems. Within the limited time available for reply, we therefore have sought to demonstrate that the arguments and theories now relied upon by the government are as incorrect as those heretofore advanced by it in the lower courts.

Because the facts here involved are complicated, we have prepared for the assistance of the Court an explanatory chart appearing on the following page which reflects the relationships of the various parties to each other and the dates of the several marriages and entries into the United States.

1. FAMILY RELATIONSHIP OF THE PARTIES.

Munio Knoll, a petitioner.
Leopold Knoll, acquitted.
Regina Treitler, a petitioner.
} *Brothers and Sister.*
Marcel Lutwak, *their nephew,* a petitioner.

2. DATES OF MARRIAGES AND ENTRIES INTO THE UNITED STATES.

Maria and Munio Knoll:

Married—Poland, 1932.
Divorced—Rabbinical—Budapest, 1942.

Maria Knoll and Marcel Lutwak:

Married—Paris, France, August 31, 1947.
Entry—September 9, 1947.
Divorced—Illinois, April, 1950.

Bessie Osborne and Munio Knoll:

Married—Paris, France, November 3, 1947.
Entry—November 13, 1947.
Divorce—pending in Illinois at time of trial.

Leopold Knoll and Grace Klemtner (dismissed from indictment prior to trial):

Married—Paris, France, November 6, 1947.
Entry—December 5, 1947.

ARGUMENT.

I.

POST CONSPIRACY ACTS ARE NOT RELEVANT AGAINST CO-CONSPIRATORS NOT PRESENT. THE CONSPIRACY CHARGED HERE IN THE INDICTMENT TERMINATED UPON THE LAST ENTRY AND HENCE SUCH ACTS WERE INADMISSIBLE. FURTHER, A SHIFT IN THE GROUNDS FOR ADMISSION INTO EVIDENCE OF SUCH ACTS IS REVERSIBLE ERROR.

The government contends that the case of *Krulewitch* v. *United States*, 336 U. S. 440 (1949) has no application to the case at bar. It takes this position in the face of the fact that the trial court here expressly admitted the evidence complained of under that part of the indictment charging a conspiracy (R. 6, 7, 67, 68), the nature of which was expressly condemned in the *Krulewitch* case by this Court. The government's failure to defend the grounds for admission relied on by the trial court and there urged by the prosecutor is eloquent evidence of its indefensibility and of the error here involved. Instead, the government attempts to justify the admission of this evidence on two other entirely different grounds, neither of which is sound. Even if, *arguendo*, such grounds were valid, the government's reliance on them now is reversible error, as is hereinafter shown (pp. 7-8).

A.

Acts of One Conspirator Occurring After the Termination of a Conspiracy Are Irrelevant as to Other Conspirators Not Present When the Acts Took Place. Even if Relevant, Reversal Is Here Required Since the Grounds Upon Which Such Evidence Was Admitted in the Trial Court Were Different and Much Broader.

The government first argues that post-conspiracy acts of certain petitioners (as distinct from their declarations) performed outside the presence of other petitioners have

a logical tendency (relevancy) to prove a material issue in the case at bar, *i. e.*, the intent of all petitioners (Resp. Bf., pp. 33, 36, 38, 41).[1]

It then contends that any evidence which has a logical tendency to prove a material issue is admissible (Resp. Bf., p. 38, fn. 22) and, therefore, post-conspiracy acts of certain petitioners outside of the presence of other petitioners are admissible against all.

There is no such rule as that announced by the government, and the premise upon which it is based is fallacious, as is demonstrated hereinafter. Significantly, no authority or case in point is cited in its support.[2]

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1. The government has summarized that which it believes to be material in this respect as "the nature and purposes of the marriages, the intentions of the parties with respect to the marriages, and the truth of the representations that they are husbands and wives who intended to live together * * *" (Resp. Bf., p. 24). Clearly, none of these issues could be determined or resolved without examining the intent of the parties.

In asserting that the issue as to the intent of the parties is material, the government has taken a position inconsistent with its contention (Resp. Bf., pp. 66-75) that the validity of the marriages is inconsequential.

2. The government relies on *United States* v. *Rubenstein*, 151 F. (2d) 915 (C. A. 2d 1945) as being squarely in point on this proposition (Resp. Bf., pp. 39-41). It is not. First, the objection to the admission of proof of a collusive divorce after entry and after the termination of the conspiracy was on the grounds that such proof was evidence of an independent and disconnected conspiracy (p. 917). Secondly, that evidence was admitted, not on the defendant's intent, but to *corroborate* the testimony of the spouses as to what *they* had originally intended and agreed upon (p. 917). In the case at bar, three marriages, not one, were involved, and acts of all six parties to the marriages after entry were admitted generally (for another and entirely different purpose) although only one party testified adversely on the question of intent as to one marriage. For argument that there is considerable doubt as to whether the Second Circuit would still follow this decision, see our discussion, pp. 12-13, Petition for Certiorari.

Reliance by the government on Professor Morgan (Resp. Bf., p. 37) is also misplaced, and the quotation referred to is completely out of context. Actually, the problem there discussed was whether or not the act of a conspirator is admissible against a co-conspirator when that which would make it competent, *i. e.*, the conspiracy, is an ultimate fact for the jury's ascertainment. Under such circumstances both the act and the ultimate question properly go to the jury *if the act is relevant*. The government has here begged the question.

The government, nevertheless, takes this position although it must be aware that this Court on numerous occasions has taken a position directly opposing and has stated that such post-conspiracy acts are inadmissible. *Brown* v. *United States,* 150 U. S. 93, 98 (1893); *Logan* v. *United States,* 144 U. S. 263, 309 (1892); *Fiswick* v. *United States,* 329 U. S. 211, 217 (1946).

The government's main error lies in its failure to recognize the elementary principle that generally a person is not bound by nor made criminally responsible for the acts of others. This is plain logic and is based upon the obvious reason that one cannot be responsible for that with which he has no connection or which is not within his dominion or control. 14 Am. Jur., Criminal Law, § 63.

Under such circumstances, there being no such connection, the acts of one have no probative force or legal tendency to prove anything material against another. Such acts are, therefore, as to the other irrelevant.

In those cases where this Court has approved the admission of the acts of one against another, it has impliedly recognized the validity of these principles. Accordingly, this Court has always made the admission of such evidence dependent upon a criminal agency relationship—never relevancy. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 249, 250 (1917); *United States* v. *Gooding,* 25 U. S. 460, 469 (1827); *Pinkerton* v. *United States,* 328 U. S. 640, 646 (1946).

Applying this reasoning to the case at bar, it is evident that the acts of each party to each marriage had no probative force which would prove any material issue against any other petitioner not present unless such a criminal agency was made to appear. In that event, acts by one would be admissible against all since deemed to be authorized by all parties to the partnership in crime. However

when the objective of such a partnership is attained or abandoned, the agency of one to bind the others terminates. Acts done thereafter by any of petitioners thus would have no probative force against other petitioners not present, since the authority to act on their behalf, which gave such acts probative force, has ceased. Thus, evidence as to such acts is irrelevant and inadmissible as to others under the rule stated above. (We concede, *arguendo,* that such acts are admissible on the intent of those actually performing them, if relevant and competent.)

Furthermore, we point out that even if evidence of post-conspiracy acts of some of the conspirators are held to be relevant on the question of all petitioners' intent, a reversal is still required since such was not the basis for the admission of these acts in the trial court. As we have previously pointed out (Pet. Bf., pp. 26-27), the trial court admitted the acts complained of on the theory that it was proper to do so as proof of that part of the indictment charging a conspiracy to conceal and to prevent disclosure of the main conspiracy (R. 6, 7, 67, 68, 140, 142).[3]

The reason for admitting such evidence was stated by the court in the presence of the jury (R. 67). It follows that it was considered by them for the broad purpose for which it was admitted. If this evidence was admissible on the narrower grounds now urged by the government as a second thought, petitioners quite clearly would have been entitled to an instruction limiting the evidence to the question of their intent.[4] *Wilson* v. *United States,* 109 F. 2d

3. In fact the trial court was inclined under this theory to admit against all defendants individual statements given by them to officials of the Immigration Service, approximately a year after entry, but did not do so (R. 281).

4. If, as we have conceded for the purposes of the argument, acts of some of the conspirators were admissible on the question of their intent, the others would have been entitled to an instruction to that effect, limiting such proof to those against whom it was relevant.

895, 896 (C. A. 6th, 1940); *Minner* v. *United States*, 57 F. 2d 506, 510, 511 (C. A. 10th, 1932).

However, no such grounds for admission was urged by the government in the trial court. Therefore, at the conclusion of the government's case, petitioners had a right to rely on the *Krulewitch* case as controlling on the admission of this evidence and to conclude that reversible error was in the record. (As pointed out above, the government's refusal to join on this issue indicates the correctness of petitioners' view.) Hence, their decision to offer no evidence on their own behalf was justified (R. 289). As was pointed out in *Shepard* v. *United States*, 290 U. S. 96, 103 (1933), the action of the trial court and the government put petitioners completely off guard if the government's view here prevails. This alone would require a reversal here, since, as stated in the *Shepard* case, at p. 103:

> A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected.

The government is inclined to minimize petitioners' reliance on a damaging declaration not in furtherance of the conspiracy made by one of the petitioners (R. 160) in November or December, 1947 (R. 154, 155). (Resp. Bf., pp. 34-35). The admission of this declaration as well as certain photographs (Gov't Ex. 22, 23, 24, 25) taken of some of the petitioners in night clubs has been argued (Pet. Bf., pp. 26, 29). We do not desire the Court to understand that by the above arguments, addressed to acts alone, we have abandoned our objections to that declaration and the pictures.

Further, we take exception to the government's statement that this declaration was restricted to the petitioner uttering it. The contrary appears (R. 155-60). The government's statement (Resp. Bf., p. 34, fn. 18) that the trial court limited this declaration to the petitioner making it

(R. 174) is wrong. The declaration thus limited was one made in June 1948 (R. 172). This ruling is indicative of the error affecting the admission generally of the earlier 1947 declaration. It also indicates the inconsistency of the trial court in this respect.

We conclude by pointing out that the government has offered no argument which would justify the general admission into evidence of the photographs of certain of petitioners in night clubs long after the aliens' entries.

B.

The Conspiracy Charged Terminated Upon the Achievement of the Illegal Purpose for Which It was Formed. That Purpose Was Realized Upon the Last Entry. Therefore Acts Performed Thereafter Were Inadmissible Against Those Petitioners Not Present.

The government argues secondly that the acts to which petitioners object were admissible in any event, since they were in furtherance of the principal conspiracy charged and were committed prior to its termination (Resp. Bf., pp. 42-47). This, too, represents a shift in position from the grounds upon which this evidence was admitted by the trial court.

The government alleges that this continuity of the conspiracy is found in that part of the indictment which charges petitioners with conspiring to (1) conceal their fraud and (2) arrange that the spouses would live apart and obtain divorces (Resp. Bf., p. 44). We here deal only with the latter[5] in order to demonstrate that the conspiracy terminated on December 5, 1947.

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5. With respect to the conspiracy to conceal, we have already pointed out that such a theory will not, under *Krulewitch v. United States*, 336 U. S. 440 (1949), support the admission of what would ordinarily be post-conspiracy acts (Pet. Bf., pp. 25-29).

An examination of the indictment indicates that the conspiracy count is in two sections. The first charges the conspiracy to commit the offenses charged in the substantive counts and to defraud the government of its functions. The second part is descriptive of the means by which the conspiracy was to be carried out. The substantive offenses charged the petitioners with making misrepresentations to, and concealing material facts from, immigration officers of the United States on the dates of the aliens' entries into the United States.

The charging part of the indictment makes clear that petitioners were alleged to be a combination to accomplish an unlawful or criminal act. That unlawful act, insofar as here pertinent, was to commit the substantive offenses, *i. e.*, the illegal entries by the means described. Upon those entries the criminal purpose had been accomplished, nothing further of an illegal nature remained to be done, and hence the conspiracy then terminated (Pet. Bf., p. 26). Acts thereafter done by any petitioner were not therefore admissible against others not present.

Subsequent acts might properly constitute evidence against those performing them as to their misrepresentations or concealments. Hence the government could still prove its case. But these acts—not being illegal in themselves—could not be the end-all of a conspiracy to commit an illegal act or acts.

We point out that the government's theory would here, as in the *Krulewitch* case, suspend indefinitely the operation of the Statute of Limitations, since, if it was part of the conspiracy for Munio and Maria to live together again, the crime would never be complete so long as they continued to do so.

In conclusion, we point out that the first rule contended for by the government does violence to recognized princi-

ples governing the admission of acts of one conspirator against another. The second rule would extend beyond all reasonable lengths and past the successful completion of the conspiracy the responsibility of one for the acts of another.

II.

THE ADVERSE TESTIMONY OF ALL THREE WIVES WAS IMPROPER AND CONSTITUTES REVERSIBLE ERROR.

In its Brief the government makes no real effort to support the view of the court below that in the light of reason and experience the rule as to the incompetency of a spouse to testify against the other spouse in a criminal case should be abolished. In the government's view the question is not reached, even though the court below in its second opinion preferred to rest its decision on that ground (R. 405-13). Because this question, despite the government's reluctance to discuss it, is one of great importance in the administration of the criminal laws, and because under Rule 26 of the Rules of Criminal Procedure this Court may resolve it in the light of reason and experience, petitioners believe that a full discussion of the appropriate considerations is both warranted and necessary.

At this time, however, petitioners wish only to call the Court's attention to certain additional materials not included in their original brief. Thus in Appendix A the laws of certain foreign countries dealing with testimony by one spouse against the other in criminal cases are classified and summarized.[6] In Appendix B are listed certain source materials which are representative of contemporary thinking on the role, function, and nature of

6. Petitioners' counsel wish to express their indebtedness to the Comparative Law Center of the University of Chicago Law School for its cooperation in making possible a study of the foreign materials cited in this Brief.

It is worth noting that, despite the government's contention that the privilege is personal to the spouse against whom the testimony is offered, the common law rule, where *incompetency* is the basis of the exclusionary provision, is that adverse testimony by a spouse constitutes error even in the absence of any objection by the defendant. Under the rule that a wife is *incompetent* to testify against her husband, it makes no difference whether or not the husband raised timely objection. For a recent expression of this view, see *Regina* v. *Boucher*, The Law Times, Vol. 214, Nov. 7, 1952, page 235. Cf. *Barber* v. *The People*, 203 Ill. 543, 547 (1903).

In addition, it is undisputed that one of Munio Knoll's co-defendants did interpose an objection to Maria as a witness (R. 41). See *United States* v. *Liddy*, 2 F. 2d 60 (E. D. Pa. 1924).

B.

The Admission of Grace Klemtner's Testimony Was Error, Even Though Her Husband, Leopold, Was Acquitted.

The government suggests that Leopold's acquittal may render academic the question of Grace's testimony (Resp. Bf., p. 50). This is not so, however, inasmuch as the rule is that where several defendants are on trial the spouse of one of them cannot be called as a witness against any of them. *United States* v. *Liddy*, 2 F. 2d 60 (E. D. Pa. 1924). See also the English decision, *Rex* v. *Mount and Metcalf*, 24 Crim. App. Rep. 135 (1934). The importance of this rule in conspiracy cases is obvious. Were it not the rule the prosecution could call A's wife to testify against B and C, B's wife to testify against A and C, and C's wife to testify against A and B. Necessarily, the effect of the testimony of a wife in such circumstances would be to incriminate her husband, even though the prosecution took care to have her testimony phrased so that it affected directly only the husband's alleged co-conspirators.

We also point out that the acquittal did not deprive the jury from considering Leopold's and Grace's actions as part of the over-all conspiracy charged.

C.

In Order to Justify a Finding That the Alleged Marriages Were Mockeries, It Would Have Been Necessary for the Court to Make a Preliminary Determination of Their Validity Under the Applicable Foreign Law. This the Court Failed To Do. Rather It Employed the Simple But Unwarranted Assumption That the Law of France Is the Same as That of Illinois.

The government takes the position that, at the time the court was called upon to rule as to the competency of Bess Osborne and Grace Klemtner, the record was sufficient to justify the court in concluding that the marriages were mockeries and shams (Resp. Bf., pp. 50-51). The government does not assert, however, that this means that the judge determined the marriages were invalid for all purposes but only that they were invalid for purposes of invoking the privilege. Thus the government states that "the purported marriage upon which the claim of privilege was predicated was, in every sense which bears in any significant way on the availability of the privilege, no marriage at all" (Resp. Bf., p. 53). From this it follows, according to the government's argument, that it makes no difference whether the Parisian marriages were in some sense valid, since the privilege the defendants sought to assert derives from American law and was invoked in an American court (Resp. Bf., p. 54). Surely, however, the government does not mean seriously to suggest that persons married in foreign countries, when tried in American courts, have less right to assert the privilege than

defendants who, acting on the advice of foresighted counsel, took care to be married in the United States.

The difficulty with the government's view is that the trial court was obviously ruling that enough evidence had been presented to make it a question as to whether or not there was a valid marriage. Thus the court stated, with respect to the competency of Bessie Osborne, that "There has been plenty of testimony here which certainly makes it a question of fact as to whether this woman is the wife of Munio Knoll" (R. 187). When it was pointed out to the court that the validity of the marriage, which took place in France, would have to be determined under French law, the court indicated that he would assume that "The law of Paris, France, is the same as the law of Chicago, Illinois, with respect to people going through something that is a mockery, which they did not intend to be a marriage." And further that "the law of France, if it is pertinent, is the same as in Illinois, that if people go through a mockery, it is not a marriage" (R. 189).

Plainly, the court was not ruling whether or not the marriage was the kind of marriage which justified invoking the privilege. Rather the court was ruling that the evidence indicated that there was no marriage, and in order to make that ruling the court assumed that the French law and the law of the forum were identical in that both considered null marriages such as the facts here, in the opinion of the court, indicated. Elsewhere the government, conceding that the court did so rule, writes that the particular problem in this case is one "*where an alleged wife has been found by the judge not to be a wife* and she is therefore permitted to testify * * *." (Emphasis added.) (Resp. Bf., p. 61.)

The rule, as it has been enunciated for generations, is that the husband or wife of a defendant is incompetent as

an adverse witness; or, as it has been expressed in some statutes, the spouse of a defendant may not testify against him in a criminal case without the defendant's consent. The rule is an exclusionary rule, and it applies wherever there is a valid marriage. There is nothing in the authorities to suggest, as the government does, that a valid marriage may nonetheless not constitute a sufficient basis for invoking the privilege, if, for example, the parties do not live together or are found to be incompatible or openly hostile to one another.

Since this is the rule, the trial court, in making its preliminary determination, had to decide a question, which involved a subsidiary question of law, based upon the evidence before it. The question was, did the facts in the record justify a conclusion that the marriages were invalid. Since the rule is universal that the validity of the marriage is determined by the law of the place where the marriage is contracted, the trial court had to give consideration to the law of France. Since the government made no effort to prove the law of France, *despite its burden of proof*, the court assumed it and found that under that assumed law these marriages were invalid.

What Judge Learned Hand wrote in *United States* v. *Rubenstein*, 151 F. 2d 915 (C. A. 2d 1945), relied upon here by the government (Resp. Bf., pp. 53-54) may be true as to the law of New Jersey, but it is definitely not true universally that a marriage in jest is not a marriage at all.[8] What is more, it is obvious here that these were not marriages in jest, but rather, if the government's evidence is to be believed, particular purpose or limited purpose marriages.[9] As petitioners pointed out (Pet. Bf., pp. 47-48), American law recognizes a distinction between a marriage in jest and a particular purpose or limited purpose mar-

8. See *Infra.*, p. 23, fn. 11.
9. See 14 A. L. R. 2d 614-15.

riage. The view has wide acceptance that while the marriage in jest is void, the limited purpose marriage is not.

III.

WHERE THE ISSUE TO BE DETERMINED BY THE JURY COINCIDES WITH THE ISSUE TO BE DETERMINED IN ESTABLISHING A WITNESS'S COMPETENCY, IT IS IMPROPER FOR THE TRIAL COURT, AFTER HAVING DETERMINED THAT ISSUE IN SUCH A FASHION AS TO PERMIT THE WITNESS TO TESTIFY, TO ALLOW THE WITNESS TO GIVE TESTIMONY BEARING ON THAT VERY ISSUE.

The government virtually concedes that this is the rule of *Miles* v. *United States,* 103 U. S. 304 (1881). The government argues, however, that the rule makes no sense and that in any event there are possible distinctions between this case and the *Miles* case.

A close reading of the *Miles* case indicates, however, contrary to the contentions made by the government, that the trial court clearly ruled on the competency of the witness Caroline Owens, the second wife. The Court states, at page 308:

> The defendant, therefore, objected to the introduction of Caroline Owens as a witness against him, the objection being based on the statute just quoted.
>
> The court overruled the objection and admitted her as a witness. * * *

Thus it is apparent that the defendant sought to prevent Caroline Owens from testifying against him on the ground that she was his wife, and that the trial court ruled against the defendant and allowed Caroline Owens to testify. The only proper basis for such a ruling was that sufficient evidence had been introduced to indicate a prior subsisting marriage, namely the defendant's marriage to

Emily Spencer. As the wife in an invalid marriage, Caroline Owens would obviously have been a competent witness.

The ruling of the *Miles* case is that it was error for Caroline Owens, even though a competent witness for some purposes, to give testimony tending to prove the marriage of the defendant to Emily Spencer, the first wife. Even if this Court had been of the opinion that the trial court had not adequately made a preliminary ruling on the issue of competency, that fact would not alter the emphatic language of the Court holding that the admission into evidence of Caroline Owens' testimony as to the defendant's first marriage was error.

The government says that if that is the rule in the *Miles* case it has no basis in reason. Closer analysis indicates, however, that there is a very sound reason for the rule. The problem arises, as in the *Miles* case and here, where fact "A" must be established in order to determine that a witness is competent. "A" is also a key issue, perhaps the sole issue to be found by the jury, and a verdict of guilt necessarily must rest upon a finding of "A". Where the witness is found competent by the court, that finding means, and having heard the objection to the witness's competency the jury could not help but realize that it means, that the judge had made a finding of "A". Otherwise, he could not have permitted the witness to testify. When the witness thereupon takes the stand and testifies as to "A", the witness is doing so under circumstances in which the jury realizes that the judge has already found "A". Frequently, too, the court will have found "A" primarily on the basis of the witness's own recitation to the court on *voir dire* of the facts tending to show "A".

In this case, as well as in the *Miles* case, permitting the spouse to testify as to the facts showing the invalidity of her marriage, which facts were basic to a ruling that she

was competent, put before the jury crucial testimony as to the key issue in the case which the members of the jury could not help but evaluate in light of their realization that the judge had already heard those facts and had found them sufficient to conclude that the marriage was invalid.

It is this coincidence between the primary issue for the judge and the ultimate issue for the jury which justifies the rule in the *Miles* case. It is the lack of such coincidence, moreover, which makes the decision of the Supreme Court of Georgia in *Hoxie* v. *State*, 114 Ga. 19 (1901) irrelevant (Resp. Bf., p. 61). In the *Hoxie* case, where the defendant was accused of murder, a woman was called to testify against him over objection that she was his wife and therefore not competent. She was permitted to testify, however, and stated to the jury, over objection, that she was not the wife of the defendant.[10] Obviously her statement that she was not the defendant's wife did not bear directly upon the ultimate issue to be decided by the jury, since the innocence or guilt of the defendant did not depend upon a finding that the witness either was or was not his wife. Since concidence was lacking in the *Hoxie* case, the jury did not hear evidence on the principal issue which the court's ruling on the witness's competency, assuming it made such a ruling, would necessarily indicate to the jury was convincing and sufficient.

It is not surprising that the *Miles* case has not had a busy career in the federal courts. Problems of the kind dealt with in the *Miles* case, of course, have been primarily concerns of the states, and the *Miles* case has been followed in state opinions. See, *e. g.*, *Lowery* v. *The People*,

10. Apparently the trial court allowed the jury to decide the woman's competency as a witness. But as the government never tires of pointing out, the ruling as to competency is for the judge alone.

172 Ill. 466, 471 (1898); *Barber* v. *The People*, 203 Ill. 543, 548 (1903), where it is cited for the rule for which petitioners here contend.

It is beside the point to contend, as the government does (Resp. Bf., pp. 64-65), that one of the reasons for the *Miles* decision is the fact that the spouse was incompetent either as a witness for the defendant or as a witness against him. For the incompetency of the spouse to testify against is not dependent upon or necessarily related to the incompetency of the spouse to testify for the defendant. See *Funk* v. *United States*, 290 U. S. 371 (1933). What the defendant objected to in the *Miles* case was that the testimony of the second wife was adverse as to a matter which coincided with the facts determinative of the second wife's competency. The circumstance that at the time of the *Miles* case the spouse was likewise incompetent to testify for the defendant has no real bearing upon the outcome of the case or this Court's reasoning.

In *Matz* v. *United States*, 158 F. 2d 190 (D. C. App. 1946), which cites the *Miles* case, the second wife did not testify as to any fact tending to establish the first marriage. She testified only that she had met the first wife, whom she had thought was the defendant's sister, and that she had seen the first wife in the courthouse on that day. Obviously that testimony did not coincide in any respect with the question the court had decided in determining that the second wife was competent, and nothing in that testimony had any direct bearing upon the ultimate issue of whether or not the defendant had committed bigamy.

IV.

THE VALIDITY OF THE PARISIAN MARRIAGES WAS A CENTRAL ISSUE IN THE TRIAL COURT AND IN THE COURT OF APPEALS. THE GOVERNMENT CANNOT NOW SUPPORT A VERDICT ON AN UNSOUND THEORY PRESENTED HERE FOR THE FIRST TIME.

Respondent again refuses to support or justify the theory upon which both the court below and the trial court found these marriages invalid. It has avoided petitioners' argument (Pet. Bf., pp. 44-47) that the law of France governs the marriages, that there is no presumption that French law is the same as that of the forum, and that the burden was on the government to prove the French law. Instead, it argues that whether or not the parties were validly married under French law is immaterial since the crime they were charged with was that of conspiring to "misrepresent the aliens as 'spouses' within the War Brides Act" (Resp. Bf., p. 67).

There are two things wrong with this argument. First, in passing the War Brides Act, Congress did not pass a marriage statute. The word "spouse" in the Act must be interpreted under the laws of the country in which any particular marriage was contracted. Second, the government's argument overlooks completely what the indictment and trial were all about. No matter what the government would like to make of them in this Court, the indictment and trial, and the argument in the Court of Appeals as well, rested upon the assumption that the government had to show that the marriages were void in order to obtain convictions.

The War Brides Act, Title 8, U. S. Code, Section 232, provides for the admission into the United States of

> alien spouses or alien children of United States citizens

serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War.

Who is a spouse within this section is a question which necessarily must be decided in the light of the law applicable to the marriage from which the status of spouse is derived. There is no such thing as a spouse, *i. e.*, a status having definite legal significance, apart from some law, and the universal rule is that the law to be applied in determining the status as spouse (and necessarily the validity of the marriage from which the status of spouse is claimed) is the law of the country or state where the marriage was contracted. Conceivably Congress might have passed a marriage law or a law admitting only those spouses whose marital status accorded with what Congress thought the law should be. But it did not do so, and the plain language of the section, in using the term "spouse", requires that the law applicable to any such marriage be consulted.

As a matter of fact, in passing this statute Congress must have realized that a substantial number of the marriages would take place in foreign lands. When the law was enacted in 1945, American soldiers were stationed in countries as diverse in their legal systems as Germany, Japan, New Zealand, India, Iran, Egypt, England, and Russia. Quite clearly, American soldiers marrying aliens in any one of those countries would have to comply with the marriage laws of that country. And petitioners' counsel are informed that early in the occupation of Germany the military authorities advised American personnel that the validity of any marriages entered into in Germany would have to be determined by the applicable German law.[11]

11. In this connection, it is worth noting that under the law of Germany a sham or fictitious or simulated marriage is valid. This is true as the result of paragraphs 1323 and 1330, in connection with paragraph 117, of the Bürgerliches Gesetzbuch. A recognized German authority on family law, Kitt and Wolff, *Familienrecht*,

The position the government now takes in effect repudiates the indictment, the trial, and the Court of Appeals. The issue of the validity of the marriages was paramount at each of these stages in the case. Count One of the indictment charges that the parties entered into "ostensible" marriages solely for the purpose of representing them as marriages to the United States Immigration and Naturalization Service (R. 6) and that the defendants conspired to commit the offenses set forth in Counts Two to Six.

Counts Two and Three charged that Munio Knoll and Leopold Knoll aided and abetted by other defendants

> did unlawfully and knowingly obtain entry into the United States * * * by falsely representing to the United States Immigration and Naturalization Service * * * that [he] was married to * * * a citizen of the United States and by concealing and omitting to state * * * that [he] had gone through a marriage ceremony * * * solely for the purpose of representing himself as her husband in the said application for admission into the United States (R. 9-11).

Counts Four, Five and Six charged defendants with causing

> to be made a false statement under oath in an application required by the Immigration laws * * * that is to say * * * the statement that the defendant * * * was then married * * * whereas the defendants then and there well knew, the defendant * * * was not in fact then married (R. 12-14).

(7th Ed. 1931), at page 75, states that a marriage entered into for the purpose of putting up an appearance or a simulated marriage is valid, and that this is so even though the officer of civil status (Standesbeamte) knows that that is the situation. This German rule does not appear to have been materially affected by Paragraph 19 of the Ehegesetz of 1938, as re-enacted as Control Council Law No. 16 of February 20, 1946, which has to do with marriages entered into by a woman solely for the purpose of acquiring the man's name. Incidentally, although this law was apparently intended to prevent Jewish women from acquiring Aryan names, the German courts during the Nazi regime stated that it was to be strictly construed. See Entscheidungen, Reichsgericht in Zivilsachen, Vol. 171, p. 79.

As is apparent from the indictment, an essential element of the crime for which the defendants were indicted and tried is guilty knowledge or intent. Since they were charged with conspiring to misrepresent marital status, the question of whether the representations were true or false depends upon whether the marriages were in fact valid or not valid. In order for there to be an intentional misrepresentation of marital status, the alien spouse had to believe that they were in fact not validly married when they represented to the immigration authorities that they were married. To argue now that whether the marriages were valid or not is immaterial, as the government does, is to concede that an essential element of the proof is lacking.

The trial court, recognizing that the essential issue created by the indictment and the evidence was the validity or invalidity of the marriages the defendants were charged with conspiring to misrepresent, charged the jury at great length with respect to the validity or invalidity of a marriage. He instructed at the government's request, and over defendants' objections (R. 298, 299, 304, 306, 307):

> The Statute under which the aliens entered into the United States as non-quota immigrants did not vest in the immigrants an absolute right to enter into the United States. The entry of each of the aliens in the instant case into the United States was expressly on the condition that they were married to citizens of the United States who had been honorably discharged from the Armed Forces of the United States. It is a question of fact based upon the evidence in this case for the jury to determine whether or not at the time the aliens entered into the United States under the provisions of the United States Code they were in fact entering *as man and wife* and to thereafter reside in the United States as man and wife. * * *
>
> Mutual consent is necessary to every contract and no matter what forms of ceremonies the parties may go through indicating the contrary, they do not contract

if they do not in fact assent, which may always be proved. *Marriage is no exception to this rule: a marriage in jest is not a marriage at all. It is quite true that a marriage without a subsequent consummation will be valid;* but if the subjects agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, *they have never really agreed to be married at all.* They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretense or cover to deceive others.

You are hereby instructed that it is for you, the jury, to determine from all of the facts in evidence what the intentions of the parties were at the time the marriage ceremonies were performed (R. 338-39). (Emphasis added.)

And at defendants' request, the Court instructed (R. 340):

If the consent of the parties is plainly expressed, *a secret reservation of one of the parties will not invalidate the marriage,* nor will the fact that one of the parties gave his consent to the marriage because of some ulterior motive or motives invalidate it. *If the essentials of capacity and consent are present, the marriage is valid,* even though one of the parties consented because he expected some material advantage as the direct consequence of his entering into the marriage. *The mere fact that one of the parties to a marriage knew and expected that by reason of entering into the marriage, his coming to the United States would be facilitated does not in and of itself render the marriage invalid.* (Emphasis added.)

The trial court thus recognized that the validity of the marriages was a crucial issue in the case, but he refused to accept the view that the validity of the marriages must be determined under French law, stating

I would assume the law of Paris, France, is the same

> as the law of Chicago, Illinois, with respect to people going through something that is mockery, which they did not intend to be a marriage (R. 189).

Presumably, the instructions as given were intended to reflect Illinois law as to the validity of the marriages. Thus if the instructions should have been given pursuant to the laws of France, reversible error was committed. Or if, as the government now contends, the validity of the marriages was immaterial, was not error committed in giving the government's instructions as to the validity of the marriages over defendants' objections?

The Court of Appeals also recognized that the validity of the marriages was the crucial issue in the case. The original opinion of the Court of Appeals stated that

> The contest in the Trial Court centered largely about these two questions, viz. did the defendants conspire, and if so, did the Government prove by competent evidence *that the marriages were in fact invalid* (R. 392). (Emphasis added.)

The opinion also said that

> Before the jury could properly conclude that the scheme became an illegal conspiracy, it was necessary that the evidence be sufficient to justify the question that the three marriages were void,—of no legal effect, and that they were so intended, *for if they were valid, the Government cannot complain* (R. 395). (Emphasis added.)

The government asserts in this Court that whether or not the marriages were invalid is beside the point, and consequently, it is unnecessary to decide which law should determine their validity or invalidity. In view of what transpired in the trial court and in the Court of Appeals, this assertion, if correct, means of necessity not only that the Court of Appeals and the trial court committed a serious error as to what the issues were, but also that the jury

was erroneously instructed, and that the defendants were convicted of a crime other than the one charged in the indictment. Cf. *Bates* v. *United States*, 323 U. S. 15 (1944); *Minnich* v. *Gardner*, 292 U. S. 48 (1934); *Cole* v. *Arkansas*, 333 U. S. 196 (1948); *United States* v. *La Franca*, 282 U. S. 568, 576-77 (1931); *Pearson* v. *United States*, 192 F. 2d 681, 694 (C. A. 6th, 1951).

The petitioners were apparently convicted of conspiring to commit an offense, which, chameleon-like, changes its complexion from government Brief to government Brief and from court to court. Thus, whether the government is correct in the position it now takes, or whether petitioners are correct in asserting that the government had the burden of proving the invalidity of the marriages under French law, error was committed, and this Court should reverse the convictions.

V.

ON THE FACTS OF THIS CASE THE BIGAMOUS MARRIAGE INSTRUCTION WAS NOT PROPER. THE EVIDENCE UPON WHICH THE JURY WAS ASKED TO DECIDE WHETHER THE RABBINICAL DIVORCE OF MARIA AND MUNIO WAS EFFECTIVE WAS WHOLLY INSUFFICIENT.

The government has somehow concluded that the evidence as to Maria and Munio "pointed * * * strongly to an undissolved first marriage * * *" (Resp. Bf., p. 76, fn. 42). The Court of Appeals, on the other hand, concluded that whether Maria and Munio had been legally divorced was "not determinable from the record" (R. 393, fn. 1).

As summarized by the government (Resp. Bf., p. 75), the evidence on this point is hardly overwhelming. Moreover, although the government emphasizes that Munio Knoll changed his story, asserting originally that the divorce was a civil divorce and then that it was rabbinical,

it fails to mention how the whole subject of the rabbinical divorce entered the case in the first place. The jury heard of it in the prosecutor's opening statement, in which he said that the government "expects to show and submits it will prove that * * * these two persons obtained, during the war, what is known as a rabbinical divorce in Budapest * * *" (R. 23). Thus the government said it would prove a rabbinical divorce, and since the only evidence on the subject was contained in the statements of Munio Knoll to the Immigration and Naturalization authorities, the government can hardly now say that it proved either the absence of a divorce or the likelihood that the divorce shown was of no effect. Having undertaken to place certain facts before the jury, the government had an obligation to give those facts to the jury. If further facts were needed to make the facts actually adduced meaningful, it was up to the government to provide those facts too.

Obviously, the jury could not be expected to know whether a rabbinical divorce in Hungary in 1942 between two refugee Polish Jews was effective or not, in the absence of evidence on the subject. Having put this rabbinical divorce into the record, therefore, the government could not leave the jury to sink or swim on the basis of an instruction advising them that "the marriage of a man and a woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced, is void" (Instruction 22, R. 339, 354).

It is this circumstance, namely, the government's undertaking to prove a rabbinical divorce, which clearly distinguishes this case from the usual bigamy trial. There the prosecution introduces evidence of the first marriage and evidence of the second marriage, and then rests. If the defendant claims that the first marriage was invalid or that it was dissolved, it is up to him to come forward with

evidence to that effect, since the usual presumption in favor of the second marriage, applicable in civil cases, is inoperative.

Apparently here the government wanted the jury to think that the rabbinical divorce was not effective to dissolve the marriage of Munio and Maria. Otherwise, why should it go out of its way to advise the jury that it would prove that such a rabbinical divorce took place, and then offer Instruction No. 22 (R. 329)? But asking the jury to reach that conclusion is quite a different thing from asking the jury to decide, on a showing of two successive marriages, that *no divorce* had taken place. Since it was the former conclusion the jury was asked to draw, and not the latter, the government was obliged to give the jury sufficient evidence from which to reach the desired conclusion. Thus the rule which prevails in bigamy cases, and upon which the government relies in justification of the bigamous marriage instruction (Resp. Bf., pp. 76-78), does not save the government from the consequences of a record from which the effectiveness of the Maria-Munio rabbinical divorce is "not determinable."

There is one further point. The majority rule appears to be that in a bigamy case the defendant's belief that he had been divorced from his first wife is no defense. There is a contrary view, however, to the effect that such a belief is a defense. Thus evidence as to the defendant's belief or good faith is, in jurisdictions adopting the latter position, admissible. 7 Am. Jur., Bigamy, § 51. Quite clearly, in the nature of the offense charged here, knowledge on the part of the alleged conspirators that the "ostensible" marriages were not real marriages was an essential element to be proved as part of the government's case. In the case of Munio, therefore, his awareness that he had not been validly divorced would have to be shown, thus making

it all the more essential that the government give the jury some evidence upon which to base a finding that the rabbinical divorce did not dissolve Munio's marriage to Maria.

CONCLUSION.

We believe that we have shown that the arguments of the government are unsound and fail to support the positions for which the government contends. We point out that the assertion by the government of its new theories and grounds for the admission of evidence would serve, if approved by this Court, to place defendants in future criminal cases at great disadvantage and make their defense, at best, guesswork. Justice requires a rejection both of the government's arguments and tactics and of the opinions expressed by the court below.

For the reasons advanced here and in petitioners' original Brief, the judgments should be reversed.

Respectfully submitted,

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APPENDIX A.

The Laws of Foreign Countries Dealing With Testimony by One Spouse Against the Other in Criminal Cases.

An examination of the statutory and case law of England, members of the British Commonwealth of Nations, the Australian states, and certain European countries reveals that restrictions upon adverse testimony by spouses are widespread. In some instances, as the summaries below indicate, similar restrictions apply to the testimony of persons other than the spouse, such as a fiancé, a former spouse, and close relatives.

Although counsel do not wish to represent to the Court that this material has been exhaustively studied or that all the relevant statutes and decisions have been found, they do believe that in view of the sweeping character of the Court of Appeals decision, the experience of other countries, some of which experience counsel have been able to locate and summarize, is pertinent and significant.

Although classifying these various foreign statutes is difficult, it is believed that the following presentation is reasonably accurate:

One spouse is not competent to testify against the other in a criminal case, except in certain specified instances:

Great Britain. Section 1 (c) of the Criminal Evidence Act of 1898 provides that "The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged." Section 4 (1) enumerates the instances in which the husband or wife may be called as a witness without the consent of the accused. Most of these

exceptions involve sexual offenses, crimes against the person or property of the spouse, non-support, and the like. Section 4 (2) provides that the Act shall not affect any case where at common law the husband or wife of the person charged could be called as a witness without his consent. See *Rex* v. *Lapworth* [1931], 1 K. B. 117; *Rex* v. *Yeo* [1951], 1 All Eng. Rep. 864. The principal common law exception to the general rule, of course, has to do with crimes against the person of the wife. In such instances the wife is not only a competent witness, she is compellable, that is, she can be made to testify even though she is unwilling. The statutory exceptions enumerated in Section 4 (1), however, only make the spouse a competent witness; they do not make the spouse a compellable witness. See *Rex* v. *Leach* [1912], A. C. 305. That the general rule is based upon ideas of incompetency and not simply of privilege is shown by the recent decision of the Court of Criminal Appeal, *Regina* v. *Boucher*, The Law Times, Vol. 214, November 7, 1952, at page 235. There the defendant was tried on a charge of larceny. After the prosecution had introduced substantial evidence against him, the wife of the defendant was called as a witness by the prosecution and asked if she was willing to testify. She thereupon testified, and *no objection was raised by the defense.* It appeared, nonetheless, that her testimony was quite damaging to the defendant. On appeal the conviction was quashed on the ground that the wife's testimony was improper. The court indicated that there was no doubt of the defendant's guilt. See, generally, Roscoe, *Criminal Evidence* (1952), pp. 132-33. It also appears that the husband or wife of a defendant is regarded as a competent witness against co-defendants only to the same extent as he or she would be against his or her spouse. See *Rex* v. *Mount and Metcalfe*, 24 Crim. App. Rep. 135 (1934).

Canada. The rule in Canada, under Sections 4 (1) and 4 (2) of the Evidence Act of 1927, appears to be substantially the same as in England. See *Rex* v. *Allen*, 22 Can. Crim. Cases 124 (1913).

South Africa. Under Sections 263 and 264 of Act 31, Criminal Procedure and Evidence, 1917, the rule appears to differ from that of England in that the spouse is competent and compellable in these instances only: offenses against the person of the spouse or of any of the children, bigamy, and incest.

South Australia. Section 18 of the Evidence Act, 1929-1933, is similar to the English statutory provisions. The instances in which the spouse is competent involve primarily sexual offenses.

The spouse of a defendant cannot testify against him without his consent. Thus the privilege to prevent the testimony is with the defendant spouse.

France. Under Section 156 and 322 of the Code d'instruction criminelle, November 27, 1808 (published by Dalloz in 1950 in Bulletin Legislatif), a defendant may prevent the testimony of his spouse. He may also exclude the testimony of his parents, grandparents, children, grandchildren, other direct descendants, brothers and sisters, and brothers-in-law and sisters-in-law. The witness, however, cannot refuse to testify.

Belgium. Sections 156 and 322 of the comparable Belgian code are the same as the French provisions. Code d'instruction criminelle, April 17, 1878 (published by Larcier in 1935 in the collection known as Les XV Codes).

Victoria. Section 34 (2) of the Crimes Act of 1891 seems to give the defendant the privilege; the exceptions are similar to those in England.

The spouse of a defendant cannot be compelled to testify. Thus the privilege to prevent the testimony is with the witness spouse.

Germany. Under Section 52 of the code of criminal procedure, Strafprozessordnung, 1/2/1877, in der Fassung vom 12 Sept. 1950 (BGBl. 629), the spouse of the accused has the right to refuse to testify. Under

Section 63, the court must advise the witness of this right to refuse to testify. The privilege also extends to the fiancé of the accused, his former spouse, and to certain relatives. Even where a marriage has been annulled, as for fraud or for bigamy, a spouse of such a marriage need not testify against the other. Entscheidungen, Reichsgericht in Strafsachen, Vol. 47, p. 286 (8 July 1913, g. I. IV 524/13).

Austria. Sections 152 and 258 of the Strafprozessordnung, 23 May 1873, contain the same provisions as the German code. The Austrian code was re-enacted after the war (Gesetz vom 12/6/1945, StGBl., Nr. 26).

Switzerland. Articles 75 and 76 of the Bundesgesetz über die Bundesstrafrechtspflege, 15 June 1934, are very similar to the German and Austrian provisions.

Norway. The Norwegian criminal procedure act, Lov om rettergangsmaaten i straffesaker (Strpl.), July 1, 1887, Chap. XV, Section 176, contains provisions much like those of Germany, Austria, and Switzerland. Under this act, even the spouse of a brother-in-law or sister-in-law of the accused is accorded the privilege.

The Netherlands. Article 217 of the Wetboek van strafvordringen (published in Nederlandsche Wetboeken, Martinus Nijhoff, the Hague, 1936) is similar to the German, Austrian and Swiss provisions. Although Article 284 requires the court to question the witness about his relationship to the accused, there does not appear to be any requirement that the witness be advised of his privilege.

New South Wales. Section 407 of the Crimes Act of 1900 provides that the husband or wife of the accused shall be competent to give evidence, but not compellable.

Queensland. Section 3 of the Criminal Law Amendment Act of 1892, as amended by the Criminal Code of 1899, the Statute Law Revision Act of 1908, and the Justices Acts Amendment Act of 1929, provides that

"Every person accused of an indictable offence and the wife or husband, as the case may be, of every such accused person, shall be a competent witness on his or her behalf, but shall not be compellable to be a witness without his or her consent." Although this language is not free from ambiguity, it appears to give the privilege to the witness.

Western Australia. Section 8 of the Evidence Act of 1906, as interpreted by *Rex* v. *Bishop* [1913], 15 W. A. Law Rep. 70, makes the spouse a competent but not a compellable witness. Section 8 (1b) provides that the court must advise the witness of his privilege.

APPENDIX B.

Representative Modern Authorities Dealing With the Marriage Relationship.

Burgess and Locke, *The Family* (American Book Co., 1945), particularly Part III—Family Organization.

Sullivan, *Conceptions of Modern Psychiatry* (The William Alanson White Psychiatric Foundation, 1947).

Goodsell, *Problems of the Family* (Century Co., 1936).

Nimkoff, *Marriage and the Family* (Houghton Mifflin Co., 1947).

Redfield, *The American Family: Consensus and Freedom* (The American Journal of Sociology, November 1946, at 175).

Wrong, *The Breakup of the American Family—Not a Dying But an Evolving Institution* (Commentary, April 1950, at 374).